A New Approach to Anti-Degradation

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background

- Antidegradation regulation (40 CFR 131.12) requiring state policies and implementation rules established in 1975.
- States are in various stages of implementation-- Some (e.g. IL, OH) have recently enacted rules but issues are developing in applying the rules to permit decisions. Others (e.g. IA) have never established implementation rules, or have old rules that need to be updated (e.g. MN)
- ELPC, MCEA, MEA and other environmental groups have been reviewing antidegradation implementation in permits and working to develop rules in getting states without proper rules.

Antidegradation Work in Mississippi Basin

- Mississippi River Water Quality Collaborative, funded by McKnight Foundation is working to establish and implement strong anti-deg rules
- Lawsuit now before Sixth Circuit Court of Appeals regarding Kentucky rules
- Rules or rule changes are currently under active consideration for Indiana, Iowa, Minnesota, Missouri and Wisconsin
- Rules are needed for Arkansas, Louisiana, Mississippi and many other states.

Common Areas of Concern

- What does Tier 1 add to permitting requirements?
- Applicability of Tier 2 review
- Assessing proposal impacts to receiving water quality
- Determining "necessity"
- Weighing social and economic factors and environmental harm
- Public participation
- State Rule writing and EPA approval process

Tier 1--Problems

- If water quality criteria were perfect there would be no need for Tier 1, but they aren't
- When there is no numeric criterion (e.g. phosphorus) or enforceable narrative standard Tier 1 protects existing uses
- When criteria are not adequate to protect uses (e.g. ammonia), analysis beyond applying criteria is also needed
- Also may need Tier 1 if waterbody use is not designated

40 CFR Section 131.12

TIER 2 Antidegradation policy

- (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless. . .

40 CFR 131.12(2), cont.

. . .the state finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. …

40 CFR 131.12(2), cont.

- …the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

Tier 2 issues

- Applicability
- Significance
- Consideration of alternatives
- Social and economic benefit
- Tier 2 for General Permits

Applicability of Tier 2

- What actions ought to trigger anti-degradation review?

MCEA's proposal for applicability

- New, modified, many reissued NPDES
- General NPDES
- Section 401 permits
- Sizeable water withdrawals
- Petition with evidence of water degradation

Existing permits

- Existing permits that have not gone through antidegradation review present a special issue
- Language proposed in Iowa is one approach to problem that addresses existing infrastructure without grandfathering unnecessary pollution

Iowa Environmental Council Proposal

The activity shall be considered not to result in degradation, if:

- It is an existing facility;
- It has previously undergone an antidegradation review {consistent with this protocol}
- It is applying for renewal with no new or expanded discharge.

Iowa Environmental Council Proposal, cont.

In renewing a permit for an existing facility for which an antidegradation review has not previously been performed, the operator of the facility may choose between:

- Performing an antidegradation review, or
- Accepting permit limits that allow only the amount of pollution found to be necessary by the department.

The department shall refer to the level of treatment that would be expected from a well-run facility of the type now in operation as the basis for determining the amount of pollution that should be allowed as necessary

Significance and de minimis

- Administrative benefits of significance thresholds and de minimis tests is highly overrated
- Very frequently it is easier to do an antidegradation analysis than to determine whether the new loading is "significant"

Significance Tests

- EPA position has not been consistent but generally EPA accepts as *de minimis* new pollution that consumes up to 10% of assimilative capacity combined with a cumulative cap.
- Cumulative cap was found necessary by Ohio Valley Environmental Coalition v. Horinka, 729 F.Supp. 2d 732 (.D. W. Va. 2003)
- Properly defining, measuring and implementing a de minimis based on assimilative capacity is difficult

Significance of Pollutants Without Numeric Criteria

- If significance is calculated using a percentage of assimilative capacity, a problem is presented as to pollutants for which there is no numeric criteria
- New phosphorus and nitrogen pollution can certainly be important and it is not tolerable to use any formula for calculating de minimis that would treat P or N pollution as insignificant.

Assessing impacts to water quality

- Assimilative capacity
- Data needed to determine impacts of the proposal:
  - Current water quality conditions
  - Effects of new proposed activity
  - Consider all discharges to affected water at maximum permitted capacity at critical condition

Necessity test

- If proposal will lower water quality, determine whether the lowering of water quality is necessary.
- Not necessary if there is a feasible and prudent alternative that will not lower water quality

If no alternative exists that would not lower water quality, evaluate alternatives that would minimize impacts to water

- All feasible alternatives should be considered
- Alternatives cannot be eliminated just because they are more expensive
- Affordable alternatives should be used under EPA Interim Economic Guidance
- In many cases, land treatment and other no discharge alternatives should be used
- Even if new discharge cannot be eliminated, alternatives that minimize pollution should be used

Social and economic analysis

- Factors to consider are spelled out well in current Ohio rules
- Net benefits should be considered; negative social and economic impacts of allowing new pollution should also be considered
- It is critical that public be involved in decision to trade water quality for development

Public participation

- Early in the facility planning process so that a broad range of alternatives can be considered without sunk costs
- Notice should discuss alternatives, their water quality impacts and real cost numbers

General Permits

- General permits by their very nature are hard to square with Tier 2. See Ohio Valley Environmental Coalition v. Horinka, 279 F. Supp. 2d at 760, 762
- General permits must go through an antidegradation analysis
- General permits must be written so as to only allow insignificant pollution or there must be consideration of the necessity of each use of the general permit
- General permits should be written so as not to allow use of the permit in Tier 3 waters or other sensitive sites.

Tiers 2.5 and 3

- We generally support creation of Tier 2.5 as long as it not used as an excuse not to provide full Tier 2 protections
- 40 CFR 131.12(a)(3) requires setting up Tier 3 category
- More waters should be given Tier 3 protections

State rules and EPA Approval Process

- Communication between states and EPA in formulating standards needs to be improved
- Vague rules that will lead to later controversy are not acceptable
- Antidegradation rules must properly go through state rulemaking procedures 40 CFR 131.5(a)(3), 40 CFR 131.6

Conclusion

- Proper antidegradation cannot be reduced to a simple crushing of numbers and involves considerations with which some permit writers are not now comfortable
- Many antidegradation decisions may be routine
- The public process must allow public input in decision to sacrifice an important public resource, clean water.